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APPENDIX.

FILED
APR 10 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1969. 1970

No. 1933. 71

SAMUEL J. ABATE, etc., *et al.*,
Petitioners,

v.

PAUL F. MUNDT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

Petition for Certiorari Filed January 5, 1970.

Certiorari Granted February 24, 1970.

The Rumford Company, Inc., New York, N. Y. 10007—212 732-6076—1970

(3741)

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IN THE

Supreme Court of the United States

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD S. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County.

WHEREAS, this board has made good faith efforts to comply with the constitutional requirements for equal representation in accordance with the mandate of the Court, and

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County

WHEREAS, the Charter and Reapportionment Commission appointed by this board has studied various plans of reapportionment for the County of Rockland and has submitted a majority report to this board recommending a multi-member district plan based upon the boundaries of the existing towns within the County, and whereas the legislature of the State of New York by the laws of 1969, Chapter 834, recognized the validity of establishing multi-member districts and also provided that elected town officials could also serve as members of a County legislature, and

WHEREAS, this board is desirous of maintaining the traditional and historical relationship between town and County governments consistent with the constitutional requirement for equal representation, and

WHEREAS, this board in adopting this resolution is complying with the order of the Honorable Joseph F. Hawkins which directed this board to submit a plan of reapportionment to the Court, now, therefore, be it

RESOLVED, that the plan of reapportionment for the County of Rockland set forth hereinafter is adopted and approved subject to implementation by the Court, and be it further

RESOLVED, that the Court is requested to approve such plan and provide for its effective implementation in time for the election of legislators in November of 1969, and be it further

RESOLVED, that the County Attorney is directed to submit this resolution and the plan attached hereto to the Court in compliance with the order of the Court.

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County

PLAN OF REAPPORTIONMENT FOR THE COUNTY OF ROCKLAND

Section 1. The County Legislature

The County legislature shall be the elective legislative body of the County with all the power and duties of a Board of Supervisors as provided by applicable law. The County legislators, elected from the various districts as more specifically hereinafter set forth, which include the duly elected supervisors of the towns within the County, when lawfully convened, shall constitute the legislature of the County of Rockland.

Section 2. Election and Term of Office of County Legislators

County legislators other than the duly elected supervisors of the towns, shall be elected at the general election held every other odd numbered year, from such districts and in such numbers as hereinafter provided. The term of office of County legislators other than the supervisor of each town shall be four years dating from January first of the year next succeeding their election. The first such election to be at the time of the general election in November of 1969. The supervisors of each town shall be elected as provided by applicable law.

Section 3. Qualifications of County Legislators

County legislators other than the duly elected supervisors of the towns shall be electors of Rockland County and shall have been residents continuously in the County for at least one year preceding their election, and all County legislators shall reside in the district from which

they seek election at the time of their designation for office, and shall continue to be residents of Rockland County and of the district within the County which they represent for the entire term of their office. No County legislator shall be eligible to hold at the same time any other elective Federal, State, County, Town, Village or School District office except for the duly elected supervisors of the towns.

Section 4. Districts

For the purpose of electing County legislators in such numbers as hereinafter provided, Rockland County shall be divided into five districts. All reference to towns apply to that territory wholly contained in each of the towns in the County of Rockland bounded as of January 1, 1969. The districts shall be as follows:

1. District 1 shall consist of the area contained within the boundaries of the Town of Stony Point.

2. District 2 shall consist of the area contained within the boundaries of the Town of Haverstraw.

3. District 3 shall consist of the area contained within the boundaries of the Town of Ramapo.

4. District 4 shall consist of the area within the boundaries of the Town of Clarkstown.

5. District 5 shall consist of the area contained within the boundaries of the Town of Orangetown.

Section 5. Composition of County Legislature

The County legislature shall be composed of the duly elected legislators of each district including the town su-

pervisor. After each official Federal census for the County and prior to the date required for the designation and nomination of candidates, the Board of Elections shall determine and certify the population of the smallest district. Such population will thereupon be established as the average population for each legislator. The Board of Elections shall then apportion the number of legislators among the five county districts on a population basis. The Board of Elections shall divide the average population for each legislator into the population of each district and the whole number thus obtained shall be the number of legislators for each county district together with an additional member for each major fraction, if any, resulting therefrom in each district. The legislators allocated to each district shall be elected from each district as provided herein, except that one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town.

Section 6. Vacancies

A vacancy in the office of County legislator other than a vacancy in the office of supervisor of a town, shall be filled by a majority vote of the members of the Town Board of the town contained within the district from which such legislator was elected, within thirty days after the vacancy has occurred. The person so chosen shall hold office until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election such vacancy shall be filled for the unexpired term. Any vacancy in the office of supervisor of a town shall be filled as required by law.

(Certification omitted in printing.)

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

Plaintiff,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

Index No. 2845/68

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

The issues in the above entitled action having been brought on regularly to be heard before the Honorable Joseph F. Hawkins, at a Special Term of this Court held in and for the County of Rockland, at the County Court House, New City, Rockland County, New York, on the 9th day of July, 1969, and this matter having been heard by the Court and the Court having retained jurisdiction over this matter pursuant to an order made the 28th day of May, 1969 and entered on June 2, 1969 in the Rockland County Clerk's Office, and the defendants having submitted an affidavit in support of defendants' application for approval of a plan of reapportionment for the County of Rockland made by J. Martin Cornell, sworn to the 8th day of July, 1969, such affidavit having appended thereto Resolution No. 311 of 1969, adopted by the Board of Supervisors of the County of Rockland on the 24th day of June, 1969, containing a plan of reapportionment, and plaintiff having submitted an affirmation by Frank P. Barone, dated July 8, 1969, in opposition to defendants' application, and plaintiffs-intervenors June Molof, *et al.*, having submitted an affidavit by Doris Friedman Ulman in opposition to defendants' application, and plaintiffs-intervenors Cornelius T. O'Sullivan, *et al.*, having submitted an order to show cause dated July 8, 1969, together with an affidavit of Cornelius T. O'Sullivan sworn to the 7th day of July, 1969 and an affidavit of Paul H. Rivet sworn to the 8th day of July, 1969 in opposition to defendants' application, and the Court having granted a motion for said plaintiffs-intervenors Cornelius T. O'Sullivan, *et al.*, to intervene in the within action, and the parties having appeared by counsel, and the issues having been duly heard by this Court, and a decision having been made dated July 21, 1969 by the Honorable Jo-

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

seph F. Hawkins, approving the defendants proposed plan of reapportionment, with certain modifications and limitations, and the Court having reconsidered a portion of said decision,

Now, on motion of J. Martin Cornell, Attorney for the defendants, it is

ADJUDGED, that the plan of reapportionment adopted by the Board of Supervisors of the County of Rockland, by Resolution No. 311 of 1969, on June 24, 1969, is approved and the legislative body for the County of Rockland shall be the county legislature as provided therein with the following modifications and limitations:

1. There shall be 18 county legislators who shall be elected at the general election to be held on the 4th day of November, 1969.

2. The existing five towns of the County of Rockland are denominated and declared to be county legislative districts and each shall elect to the county legislature, on a district-wide basis, the following number of county legislators respectively at the general election in November of 1969:

District No. 1, Stony Point—One (1) County Legislator
District No. 2, Haverstraw —Two (2) County Legislators
District No. 3, Ramapo —Six (6) County Legislators
District No. 4, Clarkstown —Five (5) County Legislators
District No. 5, Orangetown —Four (4) County Legislators

3. A candidate for both offices of supervisor and county legislator shall stand separately for election to each said office and if elected to both he shall be seated in the county legislature solely by virtue of his election to that body.

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

4. Vacancies, if any, in the office of county legislator shall be filled by appointment by the county legislature as required by law, and it is further

ADJUDGED, that nominations for the office of county legislator shall be made in accordance with Section 131 (7) of the Election Law and other applicable provisions of law.

Judgment signed this 31st day of July, 1969 at White Plains, New York.

Enter

JOSEPH F. HAWKINS
J. S. C.

Decision of the Hon. Joseph F. Hawkins, Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

Plaintiff.

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

Index No. 2845/1968

HAWKINS, J.:

The County of Rockland brings the instant application seeking judicial approval of its proposed plan for the reapportionment or restructuring of the County's legis-

lative branch of government. The proposal is a consequence of this Court's prior ruling on May 12, 1969, disapproving the defendants' previous proposal for an interim plan based upon a "weighted voting" arrangement.

It appears that on that occasion we were unduly sanguine when in demurring from imposing an alternative plan, we noted that judicial intervention is "* * * appropriate only when a legislative body fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so (cf. *Reynolds v. Sims*, 377 U. S. 533, 586)" and that "* * * events may make it necessary—despite our hopes to the contrary—for the court to impose a plan, as in Town of Greenburgh, *supra*, if the defendants fail to do so."

Alluding again to our prior determination, we there concluded by directing the Board of Supervisors to "* * * present to the court 'with all deliberate speed,' a proposed plan for redistricting and/or reapportionment."

In conformity therewith, a plan has been submitted to which objections are interposed by plaintiff and two intervenors, the League of Women Voters and Cornelius T. O'Sullivan, *et al.* The latter were granted leave to intervene on the morning of the adjourned argument held in connection with the pending motion, but were limited to presenting oral argument and submitting a brief.

There are essentially three decisions which are basic to any court endeavoring to square the circle or seeking an exit from the labyrinth of Rockland County's reapportionment dilemma: *Kirkpatrick v. Preisler*, ... U. S. ...., 89 S. Ct. 1225, and *Wells v. Rockefeller*, ... U. S. ...., 89 S. Ct. 1234, respectively, enjoin legislative bodies to make "good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims*, 377 U. S. 533, 577 (1964)"

and that there be "* * * equal representation for equal numbers of people" as nearly as is practicable.

It is well to note at this juncture that in the period intervening since our last opinion, the Legislature of the State of New York, by Chapter 834 of the Laws of 1969, enacted the so-called "two hats" bill permitting the same person to occupy two elected offices, that of Supervisor and County Legislator. The said statute also gives legislative sanction for re-apportioning via a multiple-member district plan for electing County Legislators.

Upon the Governor's approving the bill, unfortunately, there was neither message nor memorandum. However, the statute contains a rather complete statement of intent; and upon the Court's initiative, there was made available a "memorandum in support" of the bill prepared by its sponsor, Hon. Edward F. Crawford, Chairman of the Judiciary Committee of the Assembly. In essence, the bill's intent is to give legislative sanction to a variety of re-apportionment plans—some previously held invalid by the courts—and to accord greater flexibility to counties which have to re-apportion. We shall, subsequently, comment further on the statute.

The proponents' plan, we are assured, is the very same plan previously proposed in 1966. Its conceit is to continue and to perpetuate the existing political identities of the five towns which presently constitute the County's body corporate, with each of the said towns to elect a varying number of County Legislators dependent upon their respective populations. The minimum or base population figure for each such representative is derived from the census for the least populous town, to wit, the Town of Stony Point whose population as most recently extrapolated is 11,704. There would thus be allotted one (1) County Legislator to Stony Point, and the Town of

Ramapo—the most populous, with some 73,051 persons—allocated six (6) representatives, resulting in a total of eighteen (18) to be elected.

The proposal continues the office of Town Supervisor, providing for each town to have a Supervisor. The basis for the changes in said latter office derives from the recent statute previously referred to (Ch. 834, L. [illegible], whereby the same individual may be "elected" to two offices, i. e., County Legislator and Town Supervisor. The County Legislature is to be composed of the Legislators of each Town-District, including the Town Supervisor; but "* * * one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town." (§5)

Thus, one successful candidate in each of the said five towns who is elected Supervisor would automatically be elected a County Legislator. The terms of said offices, however, are not concurrent for the Supervisors would serve for only a two-year term whereas the County Legislators would hold office for four years. Further, a vacancy in the office of a non-Supervisor County Legislator would be "filled by a majority vote of the members of the Town Board of the town contained within the district from which such Legislator was elected." (§6)

Again we note the caveat of the late Mr. Justice Felix Frankfurter that the Supreme Court, in *Baker v. Carr*, 369 U. S. 186, 268, was creating "a mathematical quagmire" without providing the corollary "legal calculus".

As for the matter at bar, we believe—as shall be more fully explained hereinafter—that the precise percentage variations in either a multi-member as against a single-member plan are of minimal importance for the initial

root problem which has to be resolved is whether there is an insuperable constitutional barrier—temporary or permanent—to the multiple-member district technique of electing local legislators.

Further confronting this court is the rather inexorable political time-table. Assuming, but without so deciding, that there is greater legal merit to the intervenors' proposals for single-member districts, there are the myriad and complex problems involved should the court attempt plastic surgery by severing Rockland County into some eighteen separate, equal and complete districts. Despite the parties and the intervenors having had several years within which to prepare a map keyed to a single-district plan, none has been presented which the court could employ, if so minded, to delineate the requisite individual districts if, indeed, the single-member district plan is the only viable constitutional recourse.

Respecting the constitutionality of the "two hats" statute, we find no need to rule thereon since in determining the within motion, we can rely on the presumption of constitutionality—however elastic. Its intent and purpose are quite clear—and we are not without judicial conversance in this area since the statute obviously was intended, in part, to overcome our holding in *Matter of Brayman v. Stevens*, 54 Misc. 2d 974, aff'd 28 A. D. 2d 1095, and by the Court of Appeals in 20 N. Y. 2d 868, which barred a candidate from simultaneously running for both offices of Supervisor and County Representative. It may well be that the legislation validly achieves such purpose of permitting the same person to run for the two offices at the same election; but it neither provides nor sanctions the proposal at bar whereby a candidate by winning one office is automatically or, as it were, by operation of law, thereby elected to yet another office. The statute, as we construe it, is permissive, i. e., "a

plan of apportionment * * * may provide * * * that supervisors of towns * * * shall be eligible to be elected as members of the county legislative body," (§2[b]) but "election" means garnering the most votes for a particular office. It, therefore, follows that a Town Supervisor may be elected to both said offices at the same election; but he will have to run separately for each office.

It is quite conceivable—and assuredly the electors should be given such electoral option—to reject a candidate as a Supervisor but, nevertheless, to elect him to the office of County Legislator. To do otherwise is to change the statute's sobriquet from the "two hats" bill to "Hobson's Choice", particularly where a district is entitled to only one County Legislator. The statute's language—"eligible for election"—imports running for each particular office. The fortunate candidate so elected may, indeed, wear two hats, à la Pooh-Bah; but he will have to acquire them by contest, not by grace.

We note that the County places great reliance upon Mr. Justice Dillon's opinion in *Town of Greenburgh, et al., v. Board of Supervisors of Westchester County*, 298 N. Y. S. 2d 615, which was most recently affirmed by the Court of Appeals, ... N. Y. 2d .... (6/16/69), wherein he selected from three proposals a single-member district plan with modifications he engrafted. The language seized upon the County respecting the validity of a multiple-member district plan (Greenburgh Plan) constitutes dicta since, although observing that it had "good features", it was not approved by that court.

It ineluctably follows from the foregoing that the proposed plan for reapportioning Rockland County cannot be approved *in toto;* but it is equally inescapable that the re-apportionment of Rockland County has been too long delayed. Courts have approved less than ideally acceptable plans, as in *Town of Greenburgh, supra*, de-

spite reservations or qualms. (See, also, *Duquette v. Board of Supervisors of the County of Franklin*, 32 A. D. 2d 706 [1]).

It is the court's holding that the defendants' proposed plan for reapportionment is approved, but with the following modifications and limitations:

[1] The County Legislature is to be comprised of nineteen (19) County Legislators who shall be elected at the coming general election to be held on the 4th day of November, 1969.

[2] The existing five (5) towns of Rockland County are denominated and declared to be "County Legislative Districts", and each shall elect to the County Legislature on a district-wide basis the following number of County Legislators, respectively:

District No. 1, Stony Point—one (1) County Legislator
District No. 2, Haverstraw—two (2) County Legislators
District No. 3, Ramapo—seven (7) County Legislators
District No. 4, Clarkstown—five (5) County Legislators
District No. 5, Orangetown—four (4) County Legislators,

thereby constituting a total legislative body of nineteen (19) members.

The within modification of adding one additional County Legislator to the representation from the Town of Ramapo (District No. 3) is prompted by several considerations. A legislative body containing an even number of members which has no provision for a presiding officer casting a vote so as to break a tie vote invites a legislative impasse; that not too improbable eventuality is thereby eliminated.

There is a further and perhaps greater stimulus for so doing. We decline to participate in what may be characterized as a "numbers game", i. e., what are the

precise permissible percentile variations in population per Legislator, or what is an acceptable arithmetical differential between the "largest to smallest population per Legislator?" Is it, as contended by the proponents, in the ratio of "1.13 to 1", or, rather, twelve (12%) per cent as urged by the objector? (The latter, incidentally, is more nearly correct, for if one district is "7.1% under represented" and another is "2.5% over represented," this makes for a total differential of 9.6%).

The solution seems simple: by adding one Legislator to the most grievously under-represented district, we thereby diminish the inequality; and, we also provide the tie-breaking vote. Employing the County's figures of a total County population of 218,804, and dividing by 19, in lieu of the proposed 18, yields, by sheer serendipity, an exact quotient of 11,516 souls per legislator, per district—and the smallest town's population, that of Stony Point, is 12,114. It is true that Ramapo thereby acquires an additional Legislator on a 10,426 per persons basis; but no fairer arithmetical recourse is available unless the number of Legislators is doubled or trebled.

[3] A candidate for both offices of Supervisor and County Legislator will have to stand separately for election to each said office; and if elected to both, he shall be seated in the County Legislature solely by virtue of his election to that body. The instant conversion of each Supervisor into a County Legislator, but with a different term of office, paraphrasing George Orwell's oft-quoted aphorism, in "*Animal Farm*", is to declare that "all County Legislators are equal; only some are more equal than others."

[4] Vacancies, if any, in the office of County Legislator, as in *Town of Greenburgh, supra*, shall be filled by "appointment" by the County Legislature and not by the

particular Town Board of the Town which elected the Legislator to be replaced.

We wish to note and to commend the County Attorney and counsel for the League of Women Voters for their excellent comprehensive briefs and oral argument.

The defendants' application is granted to the extent hereinbefore noted. No costs.

Submit judgment on notice.

Dated: July 21, 1969

JOSEPH F. HAWKINS
J. S. C.

Appearances:

Barr and Barone, Esqs.
Attorneys for Plaintiff, Abate
664 South Main Street
Spring Valley, New York 10977

Doris Friedman Ulman, Esq.
Attorney for Plaintiffs-Intervenors,
June Molof, *et al.*
50 Pine Brook Road
Spring Valley, New York 10977

Paul H. Rivet, Esq.
Attorney for Plaintiffs-Intervenors,
O'Sullivan, *et al.*
Orangeburg, New York

J. Martin Cornell, Esq.
County Attorney, County of Rockland
Attorney for Defendants
11 New Hempstead Road
New City, New York 10956

Modified Decision of the Hon. Joseph F. Hawkins, Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, etc.,

Plaintiff,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, *et al.*,

Defendants.

Index No. 2845/1968

HAWKINS, J.:

Subsequent to the decision herein, dated July 21, 1969, the court's attention has been directed to the effect of adding one additional County Legislator to the representation from the Town of Ramapo. The court has erred in its mathematics and, upon reconsideration, finds this modification creates a thirteen (13%) per cent differential favoring the Town of Orangetown. Comparing the Towns of Ramapo and Orangetown, without giving due consideration to the effects upon the population averages and the resulting variations of percentages in all districts, leads to an undesired result. If it is sought to

implement the original intent, a greater number of legislators would have to be authorized, and this should not be imposed at this time. While the considerations set forth on behalf of the modification remain valid, the untoward mathematical conclusion requires the court to withdraw its statement that "the solution seems simple."

Additionally, it appears that the court was unduly solicitous that a possible legislative stalemate could result from an even numbered total membership in the County Legislature. Thus, there is added cause for keeping the representation for Ramapo to a total of six (6) County Legislators as originally proposed by the County of Rockland.

Accordingly, the court on its own motion, modifies its opinion of July 21, 1969, so that item [1], on pg. 6, shall provide that the County Legislature be comprised of eighteen (18) County Legislators in lieu of "nineteen (19) County Legislators"; and item [2], first paragraph on pg. 7, shall read: "District No. 3, Ramapo"—six (6) County Legislators in lieu of "seven (7) County Legislators." Except as hereinabove amended, the opinion of July 21, 1969, stands.

So ordered.

Dated: July 30, 1969

JOSEPH F. HAWKINS
J. S. C.

Modified Decision of the Hon. Joseph F. Hawkins. Supreme Court of the State of New York at Special Term

Appearances:

Barr and Barone, Esqs.
Attorneys for Plaintiff, Abate
664 South Main Street
Spring Valley, New York 10977

Doris Friedman Ulman, Esq.
Attorney for Plaintiffs-Intervenors, Molof, *et al.*
50 Pine Brook Road
Spring Valley, New York 10977

Paul H. Rivet, Esq.
Attorney for Plaintiffs-Intervenors, O'Sullivan, *et al.*
Orangeburg, New York

J. Martin Cornell, Esq.
Attorney for Defendants,
County Attorney, County of Rockland
11 New Hempstead Road
New City, New York 10956

Order, Dated August 26, 1969, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 26, 1969

Hon. George J. Beldock,
Presiding Justice.
Hon. Arthur D. Brennan,
Hon. Samuel Rabin,
Hon. Fred J. Munder,
Hon. Philip M. Kleinfeld,
Associate Justices.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants-Respondents,

v.

PAUL F. MUNDT, *et al.*,

Defendants-Respondents-Appellants.

In the above entitled cause, the above named Samuel Abate, plaintiff, June Molof, *et al.*, plaintiffs-intervenors, Cornelius T. O'Sullivan, *et al.*, plaintiffs-intervenors having appealed to this court from a judgment of the Supreme

Order, Dated August 26, 1969, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

Court, Rockland County entered July 31, 1969 and the above named Paul F. Mundt, *et al.* having also appealed from so much of said judgment as provided that a candidate for both offices of supervisor and county legislator shall stand separately for election to each said office and if elected to both he shall be seated in the county legislature solely by virtue of his election to that body and the said appeal having been argued by Frank P. Barone, of counsel for the plaintiff-appellant-respondent, by J. Martin Cornell, of counsel for the defendants-respondents-appellants, by Mrs. Doris Friedman Ulman, of counsel for the plaintiffs-intervenors-appellants-respondents Molof, *et al.*, and by Paul Rivet, of counsel for the plaintiffs-intervenors-appellants-respondents O'Sullivan, *et al.*, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed, without costs.

Brennan, Rabin, Munder and Kleinfeld, JJ., concur.

Beldock, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

(Certification omitted in printing.)

Decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

1141 AE. Samuel J. Abate, etc., plaintiff-appellant-respondent, and June Molof, *et al.*, plaintiffs-intervenors-appellants-respondents, v. Paul F. Mundt, *et al.*, defendants-respondents-appellants.

Judgment of the Supreme Court, Rockland County, entered July 31, 1969, affirmed, without costs, insofar as appealed from.

Brennan, Rabin, Munder and Kleinfeld, JJ., concur.

Beldock, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

August 26, 1969

ABATE v. MUNDT—1141 AE.

Dissent of the Hon. George J. Beldock, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

SUPREME COURT,

APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

Beldock, P.J., Brennan, Rabin, Munder and Kleinfeld, JJ.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants-Respondents,

against

PAUL F. MUNDT, *et al.*,

Defendants-Respondents-Appellants.

BELDOCK, P.J. (dissenting):

On this appeal, we have been called upon to determine the validity of the multi-member district reapportionment plan for the new County Legislature proposed by the Board of Supervisors of the County of Rockland. A subsidiary question is whether an individual elected as a town supervisor may automatically serve as a county legislator without standing separately for election to the legislative post. Special Term and a majority of this

Court has approved the reapportionment plan but has held that a candidate for the offices of both supervisor and county legislator must seek election to each post separately. I agree with this determination in part only. In my opinion, the reapportionment plan is unconstitutional.

The proposed reapportionment plan seeks to implement the "one man, one vote" principle by dividing the County into five election districts, the boundaries of which are coterminous with the boundaries of the five towns in Rockland County, and by apportioning a varying number of elective positions to each district, depending upon its population. The following chart adequately displays the mathematics of the plan:

District	Legislators	Population	Population per Legislator
No. 1 Stony Point	1	12,114	12,114
No. 2 Haverstraw	2	23,676	11,838
No. 3 Ramapo	6	73,051	12,175
No. 4 Clarkstown	5	57,883	11,577
No. 5 Orangetown	4	52,080	13,020
	18	218,804	

The result of this allotment is that Orangetown is under-represented by 7.1% and that Clarkstown is over-represented by 4.8%.* This yields a maximum variance of 11.9%.

Two recent United States Supreme Court decisions (*Kirkpatrick v. Preisler*, 394 U. S. 526 and *Wells v.*

*The average population per legislator is 12,156. Thus, Stony Point is over-represented by 0.3%; Haverstraw is over-represented by 2.5% and Ramapo is under-represented by 0.2%.

Rockefeller, 394 U. S. 542) have cast considerable doubt upon the heretofore-assumed validity of reapportionment plans which managed to achieve *de minimis* variations but which fell short of exact mathematical equality. In the *Kirkpatrick* and *Wells* cases, the court struck down single-member Congressional reapportionment plans with variances of 5.97% and 13.1% respectively. At bar, we are faced with a variance of 11.9% in a multi-member scheme involving a county legislature. In *Town of Greenburgh v. Board of Supervisors*, 32 A. D. 2d 892, affd. 25 N. Y. 2d .... [decided June 16, 1969], the Court of Appeals concurred in our approval of Westchester's single-member district plan with a maximum variance of 12.8%. I reject, however, the suggestion that, because the variance here is 11.9%, the approval of Westchester's reapportionment plan in the *Town of Greenburgh* case automatically brings the plan at bar within the ambit of constitutional standards. In my opinion, the reasoning of the *Kirkpatrick* and *Wells* cases is decisive of this appeal and we cannot justify an affirmance here solely upon the mathematics of *Town of Greenburgh*. In *Kirkpatrick*, *supra*, the court stated:

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal num-

> bers of people [is] the fundamental goal for the House of Representatives,' *Wesberry v. Sanders, supra,* at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims,* 377 U. S. 533, 577 (1964). *Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.*" (*Kirkpatrick v. Preisler, supra,* at 530-531.) (Emphasis supplied.)

The force of this statement is not diminished because of the circumstance that the court in *Kirkpatrick* was dealing with Congressional as opposed to inter-state reapportionment (see *Reynolds v. Sims,* 377 U. S. 533; *Wells v. Rockefeller, supra,* at 554 [White, J. dissenting]), nor that it was concerned with a single member as opposed to a multi-member district plan (see *Burns v. Richardson,* 384 U. S. 73; *Swann v. Adams,* 385 U. S. 440; *Kilgarlin v. Hill,* 386 U. S. 120). In light of the *Kirkpatrick* and *Wells* cases, these distinctions are essentially meaningless in the context of the one man, one vote principle; particularly so, where, as here, we are dealing with a unicameral legislature.

This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that the county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing

the abstract acceptability of a multi-member districting plan) is that the variance is *de minimis*. This argument is predicated on language in the *Reynolds* and *Swann* cases to the effect that *de minimis* variances will be accepted provided that a rational state policy underlies the basis for the variances. It seems to me, though, that the *Wells* and *Kirkpatrick* cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the court in *Wells v. Rockefeller, supra*, where New York sought to justify variances by pointing to the maintenance of county lines. The court stated:

> "* * * New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in *Kirkpatrick* that 'to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people.'" (*Wells v. Rockefeller, supra*, at 546.)

Defendants' counter-argument that the use of town lines is an obstacle to gerrymandering was met by the court in *Kirkpatrick*:

> "The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already

> rejected, that considerations of practical politics can justify population disparities." (*Kirkpatrick v. Preisler, supra,* at 534.) [footnote omitted]

In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that the towns must stay intact—a notion which has been rejected by the Supreme Court in its latest pronouncements.

Though I believe that the within plan is unconstitutional, I would not recommend that it be disapproved. Because the last day for filing nominating certifications is imminent (September 5th), I feel that our unreserved disapproval, for obvious reasons, would be ill-advised (see, *Kilgarlin v. Hill,* 386 U. S. 120, 121; *Martin v. Bush,* 376 U. S. 222, 223). Accordingly, I would modify the judgment only to the extent of directing that a new reapportionment plan be submitted after the election of November 4th.

August 26, 1969

Order, Dated October 8, 1969, of the Court of Appeals of New York.

COURT OF APPEALS.

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th. day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS.

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

Remittitur October 8, 1969.

2. No. 428. 69

SAMUEL J. ABATE,

Plaintiff-Appellant-Respondent,

JUNE MOLOF & ors., & c.,

Plaintiffs-Intervenors-Appellants-Respondents,

and

CORNELIUS T. O'SULLIVAN, & ors.,

Plaintiffs-Intervenors-Appellants-Respondents,

vs.

PAUL F. MUNDT, & ors., & c.,

Defendants-Respondents-Appellants.

Order, Dated October 8, 1969, of the Court of Appeals of New York

BE IT REMEMBERED, That on the 17th. day of September in the year of our Lord one thousand nine hundred and sixty-nine, Samuel J. Abate, the plaintiff-appellant-respondent, and June Molof, & ors., &c., and Cornelius T. O'Sullivan, & ors., the plaintiffs-intervenors-appellants-respondents, in this cause, came here unto the Court of Appeals, by Barr & Barone, Doris Friedman Ulman, and Paul H. Rivet, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Paul F. Mundt, & ors., &c., the defendants-respondents-appellants in said cause, afterwards appeared in said Court of Appeals by J. Martin Cornell, their attorney, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank P. Barone, of counsel for the appellant-respondent, and by Mrs. Doris Friedman Ulman and Mr. John F. Banzhaf, III, of counsel for the intervenors Molof, & ors., and by Mr. Paul H. Rivet, of counsel for the intervenors O'Sullivan, & ors., and by Mr. J. Martin Cornell, of counsel for the respondents-appellants, and by Mr. Robert Imrie, of counsel for the Attorney General of the State of New York, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Order, Dated October 8, 1969, of the Court of Appeals of New York

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, October 8, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(Seal.)

Decision and Opinion of the Court of Appeals of New York.

STATE OF NEW YORK

COURT OF APPEALS.

2. No. 428. 69

SAMUEL J. ABATE,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF & ors., & c.,

Plaintiffs-Intervenors-Appellants-Respondents,

and

CORNELIUS T. O'SULLIVAN, & ors.,

Plaintiffs-Intervenors-Appellants-Respondents,

vs.

PAUL F. MUNDT, & ors., & c.,

Defendants-Respondents-Appellants.

BURKE, J.:

Rockland County is presently governed by a Board of Supervisors, consisting of the Supervisors of each of the County's five constituent towns. In early 1966, a federal district court, upon its finding that the Board was malapportioned, ordered that a plan be devised which would satisfy the requirements of the Equal Pro-

tection Clause and that such plan be submitted to the voters of the County for their approval. (*Lodico v. Board of Supervisors*, 256 F. Supp. 442) Pursuant to that order, three plans were devised and submitted to the voters but were rejected at the polls.

In September, 1968, the present action was brought to compel the Board to reapportion in accordance with constitutional requirements. In response, the Board submitted a weighted voting scheme as an interim measure but, upon the plaintiffs' motion, that plan was rejected at Special Term. The Board then devised and submitted the plan approved in the courts below, which is the subject of the present appeal.

The plan as adopted provides for a County legislature composed, on the basis of the population of the County as of 1969, of eighteen members chosen from five districts which correspond to the County's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest district. The smallest district, Stony Point, has a population of 12,114 and is assigned one representative in the County legislature. The number of representatives to be assigned to each of the other districts is determined by dividing the population of each by the population of the base district, Stony Point, the number of representatives being the whole number resulting from that computation, plus any major fraction. The result in tabular form is as follows:

District	Population	No. of Representatives
Stony Point	12,114	1
Haverstraw	23,676	2
Orangetown	52,080	4
Clarkstown	57,883	5
Ramapo	73,051	6

Each representative is to be elected at large within the district so that each district other than Stony Point will be a multi-member district. Since the population of none of the other districts is an exact multiple of the population of Stony Point, there is some variation among districts in terms of the population per legislator, with the result that Stony Point is 0.3% "over-represented," Haverstraw is 2.5% "over-represented," Orangetown is 7.1% "under-represented," Clarkstown is 4.8% "over-represented," and Ramapo is 0.2% "under-represented." The plaintiffs attack the plan both on the ground that the Board has made no attempt at achieving equality of representation in terms of population and on the ground that the utilization of multi-member districts is inherently defective. In addition, the plaintiffs attacked the so-called "two hats" provision of the plan under which each Town Supervisor, by virtue of his election to that office, would also automatically become a member of the County legislature.

Special Term approved the apportionment plan but modified the "two hats" provision so as to require that Town Supervisors, if they wish to hold seats in the County legislature, must stand separately for election to that office. The Appellate Division, Second Department affirmed that determination without opinion, with one justice dissenting on the ground that the plan merely sought to achieve the best apportionment possible in terms of the maintenance of existing town lines. We, in turn, affirm the order of the Appellate Division.

I

It is, of course, true that the "one man-one vote" principle enunciated in *Reynolds v. Sims* (377 U. S. 533) is applicable to local legislative bodies as well as to state

legislatures (*Avery v. Midland County*, 390 U. S. 474, 481). Under the principles set forth for the purpose of determining whether a particular plan of apportionment meets the requirements of the Equal Protection Clause, the question is whether the plan before us adequately apportions representatives on a population basis. However, the issue is not to be resolved merely in terms of a sterile mathematical exercise:

> "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts * * * as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each has an identical number of residents, or citizens or voters. *Mathematical exactness or precision is hardly a workable constitutional requirement.*" (*Reynolds v. Sims, supra*, at 577 [emphasis added])

Thus, the mere fact that there is a variation of 13% in the number of people per legislator under the present plan is not of itself sufficient to render the plan constitutionally defective (*Roman v. Sincock*, 377 U. S. 695, 711; *Kirkpatrick v. Preisler*, 394 U. S. 526, 530; *Town of Greenburgh v. Board of Supervisors*, 25 N. Y. 2d 818). We must, therefore, in light of the particular circumstances of this case, determine whether the County has made a good faith effort to achieve equality of representation and whether there is sufficient justification for any variance from absolute equality. On this point, it should be recognized that the "one-man, one-vote" cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as

to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent (See *Wesberry v. Sanders*, 376 U. S. 1; *Kirkpatrick v. Preisler*, 394 U. S. 526; *Wells v. Rockefeller*, 394 U. S. 542). Decisions dealing with apportionment of state legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations (See *Fortson v. Dorsey*, 379 U. S. 433, 437; *Burns v. Richardson*, 384 U. S. 73; *Swann v. Adams*, 385 U. S. 440). Similarly, and of particular relevance on this appeal, the Court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intra-state legislative bodies (See *Sailors v. Board of Educ.*, 387 U. S. 105; *Dusch v. Davis*, 387 U. S. 112; *Blaikie v. Wagner*, 285 F. Supp. 364).

In light of this apparent difference in treatment, it seems clear that we may find the population variance here to be within permissible limits (See *Town of Greenburgh v. Board of Supervisors*, 25 N. Y. 2d 817) and the practical and historical justification for the variance to be sufficient. What the plan does is *not* to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government framework, thus accommodating both constitutional and practical considerations (See *Jackman v. Bodine*, 53 N. J. 585, 252 A. 2d 209, *cert. den.* 38 U. S. L. W. 3120 [10/14/69]). It represents a balanced, *bona fide* application of the "one-man, one-vote"

principle to the needs and circumstances of local government. As such, it comes within the ambit of the Supreme Court's declaration "that variations from a pure population standard might be justified by such state policy considerations as the *integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines*" (*Swann v. Adams*, 385 U. S. 440, 444 [emphasis added]) and the declaration that the recognition of such factors in devising an apportionment scheme is permissible so long as they "are free of any taint of arbitrariness or discrimination." (*Roman v. Sincock*, 377 U. S. 695, 710) We therefore reject the contention that the plan before us is constitutionally defective because of the minor population variance involved.

It is also contended that the plan's incorporation of multi-member districts necessarily indicates a constitutional defect. However, the contention flies in the face of the decision in *Fortson v. Dorsey* (379 U. S. 433) in which the Court held that multi-member districts, drawn substantially along existing county lines, are constitutionally permissible so long as the vote of each voter is "approximately equal in weight to the vote of any other citizen in the State." (379 U. S. at 438) As with Fulton County, Georgia, in *Fortson*, the population of the Ramapo district in this case is approximately six times larger than that of Stony Point, a single-member constituency, and for that reason Ramapo elects six representatives. According to the reasoning of that opinion, such a multi-member district device is permissible since each voter in Ramapo votes for six representatives to represent his interests in the County legislature and, if the weight of the vote of any voter in Ramapo, when he votes for six representatives, is not

the *exact* equivalent of that of a resident of a single-member district, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the County (379 U. S. at 437-438). That conclusion also adequately disposes of any claimed deficiency in such a plan based upon speculative mathematical analysis of such things as the "effectiveness" of actual representation. Indeed, as long as the basic population requirements of *Reynolds v. Sims* are met, and we hold that the Rockland County plan does meet those fundamental requirements, the use of multi-member districts "will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of a racial or political element of the voting population.'" (*Burns v. Richardson*, 384 U. S. 73, 88). No such showing has been made as to the plan under attack in this case. We therefore hold that the Rockland County Apportionment plan is constitutional.

II

The plan as adopted also contained a so-called "two hats" provision by which the person elected to the office of Town Supervisor of each of the five towns would automatically be entitled to a seat in the county legislature. Special Term modified this provision of the plan so as to require that, if a Town Supervisor also wished to hold a seat as a County legislator, he must be elected separately to the latter position. We affirm that determination. Town Supervisors are eligible to sit as members of County legislatures by virtue of the recently amended Section 10 of the Municipal Home Rule Law (L. 1969, ch. 834) which provides, in perti-

nent part, that "a plan of apportionment adopted by a county * * * may provide * * * supervisors of towns * * * shall be *eligible to be elected* as members of the county legislative body." (Emphasis added) The use of the term "elected" must be taken as indicating an intention on the part of the legislature that a town supervisor could serve as a county legislator only if he prevailed in an election for the office of county legislator. Although it is true that we held in *Matter of Braymen v. Stevens* (20 N. Y. 2d 868) that Section 411 of the County Law prohibited a county officer from serving as a town supervisor, that decision antedated the enactment of Section 10(13) (b) of the Municipal Home Rule Law with which it is obviously inconsistent. Under familiar principles of statutory construction, the conflict between these provisions must be resolved by holding that the latter section impliedly repealed the former insofar as they are inconsistent, with the result that the latter is controlling. Special Term therefore properly determined that the plan should be modified to the extent indicated above.

Accordingly, the order of the Appellate Division, Second Department should be affirmed.

Dissent of the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals of New York, and the Hon. Matthew J. Jasen, Associate Judge of the Court of Appeals of New York.

COURT OF APPEALS.

SAMUEL J. ABATE, as a Taxpayer, etc.,

Plaintiff-Appellant,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants,

against

PAUL F. MUNDT, *et al.*, constituting the Board of Supervisors,

Defendants-Respondents-Appellants.

FULD, Ch. J. (dissenting in part):

I agree that the Municipal Home Rule Law (§10[13][b]) permits a town supervisor to serve on the county legislature and requires that he stand separately for election to that body. I cannot, however, subscribe to the court's decision that the reapportionment plan adopted by the board in this case satisfies the demands of the Equal Protection Clause. In my view, the apportionment standards which apply to the states also apply to municipalities —e. g., counties, cities and towns—which exercise general governmental functions.

As the court's opinion indicates, Rockland County's proposal provides that each of its five towns shall constitute a legislative district. Using the smallest town, Stony Point, as a base, it accords each of the other four

towns additional seats in the county legislature in an amount determined by dividing their populations by that of Stony Point and rounding off the result to the nearest whole number. Following this year's election under the plan, Orangetown's legislators will represent 13% more people than those from Clarkstown, even though each would be accorded the same vote in the county legislature.

There is no doubt that, in passing on a plan of apportionment, we are governed by the "one man, one vote" principle laid down in *Reynolds v. Sims* (377 U. S. 533) and in the cases which followed it. The majority asserts, however, that the strictures of that principle vary and are to be applied differently depending on the "level of legislative apportionment" involved (Opinion, p. 3). More specifically, it is stated that, although the permissible variation in population between congressional districts is "almost micrometric," there is a somewhat "broader scope for permissible deviations" in the apportionment of state legislatures and a "still broader scope" where the plan involves "local, intra-state legislative bodies" (Opinion, p. 4).

Significantly, though, the opinion furnishes not a single reason which would justify such a differentiation, and I suggest that there is no basis either in logic or precedent for the distinction sought to be drawn. On the contrary, the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legisla-

ture. There is no reason in either case why a citizen's voting power—his ability to influence the outcome of the election—should depend upon the district in which he happens to live. There is, as the Supreme Court observed in *Avery v. Midland County* (390 U. S. 474, 481), "little difference, in terms of the application of the Equal Protection Clause and the principles of *Reynolds v. Sims*, between the exercise of state power through [state] legislatures and its exercise by elected officials in the cities, towns, and counties." Indeed, in *Seaman v. Fedourich* (16 N. Y. 2d 94) and in *Iannucci v. Board of Supervisors* (20 N. Y. 2d 244)—both of which antedated the Supreme Court's decision in the *Avery* case—our court expressly held that the *Reynolds* principle applies to "elective legislative bodies exercising general governmental powers at the municipal level" (16 N. Y. 2d, at p. 101; 20 N. Y. 2d, at p. 249) and rejected proposals for legislative apportionment on the county and municipal levels which failed to accord equality of representation. (See, also, *Honig v. Board of Supervisors*, 24 N. Y. 2d 861.)

In support of its conclusion that a lower standard of equality applies to elections of representatives to local legislative bodies, the court relies on two Supreme Court decisions—*Sailors v. Board of Education* (387 U. S. 105) and *Dusch v. Davis* (387 U. S. 112)—in which plans for the structuring of local governments were upheld. These cases are, however, totally inapposite. *Sailors v. Board of Education*, for instance, involved a scheme for the *appointment of nonlegislative officials* and was not at all concerned with legislative apportionment; and, in the *Dusch* case, all of the legislators were to be elected *at large* and districts (or, more precisely, boroughs) were to

be used "merely as a basis of residence for candidates, not for voting or representation" (387 U. S., at p. 116).[1]

These cases do, it is true, recognize the need for innovation and flexibility in the *organization* of local governments but there is nothing in the decisions which implies that, in drawing electoral districts for legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area. "Diluting the weight of votes because of place of residence," the Supreme Court noted in *Reynolds* (377 U. S. 533, 566, *supra*), "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race [case cited] or economic status [case cited]."

In considering the plan before us, I find it difficult, if not impossible, to accept the majority's characterization of the 13% deviation infecting the proposed plan as a "minor population variance" (Opinion, p. 5). I recognize, of course, that mathematical exactness or precision is not always possible and that the test to be applied in determining the validity of a plan is not *solely* the size of the percentage deviation. Nevertheless, an attempt must be made to keep that deviation to a minimum. As I read the relevant cases, the significant and operative consideration is whether the plan under review reflects such an effort to achieve, "as nearly * * * as is practicable," equality of representation. (*Reynolds v. Sims*, 377 U. S. 533, 577, *supra*; see *Kirkpatrick v. Preisler*, 394 U. S. 526, 531.) As the court declared in the *Kirkpatrick* case,

[1]Indeed, the court pointed out that, "If a borough's resident on the counsel represented in fact only the borough, residence being only a front, different conclusions might follow" (387 U. S., at p. 116).

legislative districts must be drawn to allow "only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which a justification is shown." (*Kirkpatrick v. Preisler*, 394 U. S. 526, 531, *supra*.)

It is the court's position that, despite the deviation population which the plan creates, factors other than population are equally significant and that the proposal represents a "*bona fide* application of the 'one man, one vote' principle to the needs and circumstances of local governments" which satisfies constitutional requirements (Opinion, p. 4). This, it seems to me, misconceives the meaning of the phrase, "good-faith effort," found in the cases. Even if one were to accept the majority's premise that the demands of the Equal Protection Clause may be relaxed in dealing with a county apportionment plan, nevertheless, the simple fact remains that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." (*Reynolds v. Sims*, 377 U. S. 533, 567, *supra*.)

In the present case, population was neither "the starting point" nor "the controlling criterion." It is undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only *after* the districts had been created and its lines fixed that any attempt was made to equalize the voting representation—an attempt which could not possibly succeed because of the nature of the plan.

Actually, the 13% deviation—described by the court as "minor" (Opinion, p. 5)—neither indicates nor reflects the potential for gross inequality of representation inherent in the scheme. Since the number of legislators

from any town is determined by dividing its population by that of the smallest town and rounding off the result to the nearest whole number, the size of the deviation will vary arbitrarily from year to year, according to the size of the fraction to be rounded.[2] For example, had the plan been in effect in 1950, the deviation would have been 26%: in 1957, 22%; in 1963, 27%; and in 1966, 26%. The potential for inequality inherent in the plan becomes even more apparent when one considers that an increase of only 3,000 in the population of Stony Point, assuming that the populations of the other towns remain constant, would change the deviation from the present 13% to more than 47%. In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%.[3] And, since the plan rigidly fixes district lines—providing for no variation—there is no way to compensate for or minimize such extreme deviations.

This, though, does not mean that political subdivisions may not be taken into account when drawing legislative districts. I recognize, of course, that there may be historical and, perhaps, functional reasons for preserving

[2]In other words, if the population of each of the towns happens to approximate an integral multiple of that of Stony Point—as it does under the 1969 census—then, the deviation will be relatively small—for example, as in this case, 13%. More typically, however, the formula will require a rounding off of large fractions and will result, accordingly, in very much greater deviations.

[3]This may be seen from the following example: if the smallest town, town A, had a population of 10,000, town B had 14,999 and town C had 15,001, then, under the plan, town C would have two representatives and town B would only have one, even though their populations were almost identical. The deviation in such a case would be 99.96%.

the identity of the towns in a county legislative body—even though no such reasons have been shown in this case and even though the towns would remain independent, coordinate governments under any scheme. All that is required is that a plan be sufficiently flexible to give all the voters of the County an equal voice in its government. Population, as the *Reynolds* case indicates, need not be the only factor to be considered but it must be the *controlling* factor (377 U. S., at pp. 579-580):

> "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle."

And, underscoring the same thought, the court went on to say (p. 581):

> "[I]f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

Here, quite obviously, population was "submerged as the controlling consideration" in fixing the boundaries of the legislative districts and, consequently, the right of the county's citizens "to cast an effective and adequately weighted vote [has been] unconstitutionally impaired."

That it is possible to reconcile the one man, one vote

principle with the desire to preserve town identity in the county legislature is demonstrated by a proposal prepared by the League of Women Voters and put forward by several of the plaintiffs. Under this plan, all but three of the 18 members of the legislature would still represent districts located wholly within town lines and, as so apportioned, the maximum population deviation would amount to only 4%. Indeed, the plan approved in *Town of Greenburgh v. Board of Supervisors* (56 Misc. 2d 152, affd. 25 N. Y. 2d 817)—upon which the court relies—illustrates an approach which could have been, but was not, followed here. Although it resulted in a deviation of 14%, slightly more than will result this year from the plan before us, the proposal in *Greenburgh* was held acceptable because town lines, while accorded weight, *were not treated as inviolate*. In sharp contrast to the present case, the traditional town boundaries were disregarded where necessary in order to accommodate the essential interest of equal representation.

In sum, then, in view of the fact that the legislative districts were drawn strictly in accordance with town lines *and without regard to population*, it is evident that there was no effort, good faith or otherwise, to achieve "as nearly as practicable" equality of voting power. Since under the plan the weight of a citizen's vote varies depending on the town in which he lives and this variance is likely to increase in future years, the plan deprives the voters of equal protection of the laws and may not be

constitutionally sustained.[4] However, in view of the imminence of the 1969 election and the fact that the plan achieves far greater equality than the existing board of supervisors form of county government, I would approve the plan as an interim measure and require the county legislature, to be elected next month, to formulate a further plan of apportionment consistent with constitutional standards. (See *Honig v. Board of Supervisors*, 24 N. Y. 2d 861, *supra*.)

The order appealed from should be modified to the extent of directing that a new apportionment plan be adopted by the county legislature chosen in the 1969 election and, as so modified, affirmed.

Order affirmed, without costs. Opinion by Burke, J. All concur except Fuld, Ch. J., who dissents in part and votes to modify in an opinion in which Jasen, J., concurs.

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[4]Having reached this conclusion, I find it unnecessary to treat the plaintiffs' further point that a multi-member districting scheme is unconstitutional on the ground that it "allocates greater voting power to voters in the most populous districts." (Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309, 1337; see *Chavis v. Whitcomb*, —— F. Supp. ——, ——, 38 USLW 2104 [decided by U. S. Dist. Ct. So. Dist. Ind., July 28, 1969]; cf. *Iannucci v. Board of Supervisors*, 20 N. Y. 2d 244, 252, *supra*.) I merely note that, although the Supreme Court has, on several occasions, upheld the constitutionality of multi-member district plans, it has yet to pass upon the arguments raised in the present case. (See, e. g., *Burns v. Richardson*, 384 U. S. 73; *Fortson v. Dorsey*, 379 U. S. 473.)

Supreme Court of the United States

No. 1033 ----, October Term, 19 69

Samuel J. Abate, etc., et al.,

Petitioners,

v.

Paul F. Mundt, et al.

Order allowing certiorari. Filed February 20 ------, 19 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of New York of Appeals is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JAN 5 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. [redacted] 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

-and-

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

-and-

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

-against-

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of New York

BARR & BARONE, ESQS.
Counsel for Petitioner Samuel J. Abate
664 South Main Street
Spring Valley, New York 10977

DORIS FRIEDMAN ULMAN, ESQ.
Counsel for Petitioners June Molof et al.
50 Pine Brook Road
Spring Valley, New York 10977

PAUL H. RIVET, ESQ.
Counsel for Petitioners Cornelius T. O'SULLIVAN et al.
35 Orangeburg Road
Orangeburg, New York 10962

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. .....

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

-and-

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CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of the State of New York

FRANK P. BARONE, on behalf of Petitioner Samuel Abate, DORIS FRIEDMAN ULMAN, on behalf of Petitioners June Molof et al. and PAUL H. RIVET, on behalf of Petitioners Cornelius T. O'Sullivan et al., joining together for the purposes of this Petition only, pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered in the above case on November 12, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969 and modified on July 30, 1969 and not yet reported is set forth in the Appendix hereto, at pages 12 and 28.

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department dated August 26, 1969 and not yet reported is set forth in the Appendix hereto, at page 30.

The opinion and dissent of the Court of Appeals of the State of New York dated November 12, 1969 and not yet reported is set forth in the Appendix hereto, at page 40.

JURISDICTION

The order of the Court of Appeals of the State of New York was made and entered on November 12, 1969 and a copy thereof is appended to this peti- on October 8, 1969

tion in the Appendix at page 69. The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

The Board of Supervisors of the County of Rockland was ordered to reapportion itself "with all deliberate speed" by an order of the Supreme Court of the State of New York at Special Term on June 2, 1969. On July 8, 1969, the Board of Supervisors submitted to Special Term for approval a reapportionment plan providing for multi-member districting. Rockland County is made up of five towns. There are no cities in Rockland County. The populations of the several towns vary enormously, as shown by the latest (1969) Federal census:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total Population	218,804

The multi-member district plan submitted by the Board of Supervisors of Rockland County on July 8, 1969, provides that each town shall be a district. Using the smallest town, Stony Point, as a base, each town is allocated as many legislators as its population is a multiple of the Town of Stony Point. Thus, the Town of Stony Point is allocated one legislator; the Town of Haverstraw, two; the Town of Orangetown, four; the Town of

Clarkstown, five; the Town of Ramapo, six; making a total of eighteen county legislators. The number of legislators would be subject to change as the population of each town shifts or increases.

Unfortunately, the towns within Rockland County are not exact multiples of the Town of Stony Point, so that the residents of the various towns do not have equal representation on their county legislature. Using the 1969 Federal census figures set forth above and the mathematical formula of Kirkpatrick v. Preisler, 394 U.S. 535, 89 S.Ct. 1225 for determining the difference in population equality among the districts within the county, the Town of Orangetown is 7.1 per cent below the mathematical ideal, the Town of Clarkstown is 4.8 per cent above the mathematical ideal and the Town of Haverstraw is 2.5 per cent above the mathematical ideal.(See Appendix page 73) The other two towns have minimal deviations. Thus, there is an 11.9 per cent deviation between the highest and the lowest population per legislator.

The Rockland County Board of Supervisors has not made a good-faith effort to achieve precise mathematical equality. Instead of reapportioning the county legislature with a view towards equal representation for equal numbers of people, the Board first set up its districts as being coterminous with existing town boundaries and let the population deviations fall

where they may.

The questions presented are:

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional?

2. Is the population deviation of 11.9 per cent between the highest and the lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good-faith effort to achieve precise mathematical equality as required by the rulings of this Court?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The basic facts, which are not in dispute, are as follows. The legislative body of the County of Rockland has statutorily and traditionally been composed of five supervisors, being the duly elected supervisors of each of the five towns. The present action was instituted by Samuel Abate, one of the petitioners herein, in the Supreme Court of the State of New York, for the County of Rockland, by the service of a summons and complaint on September 30, 1968, for judgment directing the reapportionment of the Rockland County Board of Supervisors and directing the Board to place on the ballot for referendum a 17-member, single-member district plan. Defendants' answer was served on March 14, 1969. Petitioners June Molof et al. were granted leave to intervene as party-plaintiffs by the Supreme Court of the State of New York on April 14, 1969. Also on April 14, 1969 the defendant Board of Supervisors presented to said Court for approval an interim weighted voting plan of reapportionment. The Honorable Joseph F. Hawkins, Justice of the Supreme Court of the State of New York, pursuant to an order made on May 28, 1969 and entered in the Rockland County Clerk's office on June 2, 1969, held that the interim weighted voting plan was unconstitutional and directed the Board of Supervisors to present to the Court a proposed plan of reapportionment "with all deliberate speed." On July 8, 1969, a reapportionment plan providing for multi-

member districts was submitted to the Court. On July 9, 1969, Petitioners Cornelius T. O'Sullivan et al. were permitted to intervene as party-plaintiffs.

In a decision dated July 21, 1969 and modified July 30, 1969, set forth in the Appendix hereto at page 12, Justice Hawkins approved the multi-member district plan proposed by the Board of Supervisors. All plaintiffs to this action, who are now petitioners herein, objected to the plan as being unconstitutional, based upon the Fourteenth Amendment to the United States Constitution and the decisions of this Court.

All plaintiffs appealed this decision to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department. In a decision dated August 26, 1969, the Appellate Division affirmed the Special Term Decision, the Honorable George J. Beldock, Presiding Justice of said Court, dissenting. The decision (no opinion) and dissent are set forth in the Appendix hereto at page 28. Basing his dissent on the two most recent United States Supreme Court decisions on reapportionment, Wells v. Rockefeller, 394 U.S. 542 and Kirkpatrick v. Preisler, 394 U.S. 526, Justice Beldock held that the 11.9 per cent variance between the highest and the lowest population per legislator in Rockland County did not satisfy the "one-man, one-vote" principle inasmuch as the Board of

Supervisors did not adequately justify the reasons for such variance. He therefore concluded that the plan was unconstitutional.

The decision of the Appellate Division was appealed by all the plaintiffs to the Court of Appeals of the State of New York, the highest Court in that State. The Court of Appeals affirmed the lower court's decision in an opinion dated November 12, 1969, the Honorable Stanley H. Fuld, Chief Judge of said Court and the Honorable Matthew J. Jasen, Associate Judge of said Court, dissenting. The opinion and dissent are set forth in the Appendix hereto at page 38 In his dissent, in which Judge Jasen concurred, the Chief Judge rejected the conclusions of the majority of the Court which held that although the permissible variation in population between congressional districts is "almost micrometric," the permissible deviations in the apportionment of state legislatures is broader and in the apportionment of local legislative bodies even broader than those of state legislatures. Judge Fuld stated, "the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legislature."

Judge Fuld observed that although the decisions of the United States Supreme Court recognize the need for innovation and flexibility in the organization of local governments, "there is nothing in those decisions which implies that, in drawing electoral districts for legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area." The dissent concluded that the 11.9 per cent variation in the Rockland County case was not de minimis and that the Board of Supervisors had not made a good-faith effort to achieve absolute equality, as mandated by this Court in Kirkpatrick v. Preisler, supra. Furthermore, Judge Fuld stated that there is, in the multi-member district plan, the potential for gross inequality far in excess of the 11.9 per cent deviation which currently exists. Alluding to a chart submitted by one of the appellants herein, the dissent noted that if the plan had "been in effect in 1950, the deviation would have been 26%; in 1957, 22%; in 1963, 27%; and in 1966, 26%" and that the potential for inequality inherent in the plan could be even greater.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the decisions of this Court in the area of reapportionment and, more specific-

ally, the two recent cases of this Court, Kirkpatrick v. Preisler and Wells v. Rockefeller, supra.

In Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, this Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees to each voter an equal voice in his state government, thereby extending the principle of "one-man, one-vote" to state legislative bodies. In Avery v. Midland County, 390 U.S. 474, this Court stated that there is "little difference, in terms of the application of the Equal Protection Clause and the principles of Reynolds V. Sims, between the exercise of state power through (state) legislatures and its exercise by elected officials in the cities, towns, and counties."

In Kirkpatrick v. Preisler and Wells v. Rockefeller, supra, this Court elucidated on the principle that, as nearly as practicable, every man's vote is to be worth as much as another's, and rejected both reapportionment plans because the proponents of said plans had not made a good-faith effort to achieve precise mathematical equality and could not justify the population variances, even though those variances were comparatively small. Indeed, in the Kirkpatrick case, there was a variance of only 5.96 per cent between the highest and lowest population per legislator, as compared with the Rockland County variance of 11.9 per cent between the highest and lowest pop-

ulation per legislator.

In the Rockland County case, the Court of Appeals of the State of New York drew a distinction between permissible population variances on the Congressional level, the state level, and the local level. This is in direct conflict with the decisions of this Court stated heretofore guaranteeing to each voter, "as nearly as practicable", an equal voice in his Congressional, state and local legislative bodies.

There are hundreds of local legislative bodies in New York State alone which will be affected by the Court of Appeals decision in this case. Indeed, millions of residents may lose their right to equal representation in their local legislative bodies, if the basic principle of "one-man, one-vote" is to be applied differently to Congressional, state and local governments.

CONCLUSION

For thereasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

BARR & BARONE
Counsel for Petitioner
Samuel J. Abate

DORIS FRIEDMAN ULMAN
Counsel for Petitioners
June Molof et al.

PAUL H. RIVET
Counsel for Petitioners
Cornelius T. O'Sullivan
et al.

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland and as a Representative of Others Similarly Situated,

Plaintiff,

-and-

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

-against-

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

HAWKINS, J.

The County of Rockland brings the instant application seeking judicial approval of its proposed plan for the reapportionment or restructuring of the

County's legislative branch of government. The proposal is a consequence of this Court's prior ruling on May 12, 1969, disapproving the defendants' previous proposal for an interim plan based upon a "weighted voting" arrangement.

It appears that on that occasion we were unduly sanguine when in demurring from imposing an alternative plan, we noted that judicial intervention is "***appropriate only when a legislative body fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so (cf Reynolds v. Sims, 377 U.S. 533, 586)" and that "***events may make it necessary-despite our hopes to the contrary-for the court to impose a plan, as in Town of Greenburgh, supra, if the defendants fail to do so.

Alluding to our prior determination, we there concluded by directing the Board of Supervisors to "***present to the court 'with all deliberate speed,' a proposed plan for redistricting and/or reapportionment."

In conformity therewith, a plan has been submitted to which objections are interposed by plaintiff and two inter-

venors, the League of Women Voters and Cornelius T. O'Sullivan, et al. The latter were granted leave to intervene on the morning of the adjourned argument held in connection with the pending motion, but were limited to presenting oral argument and submitting a brief.

There are essentially three decisions which are basic to any court endeavoring to square the circle or seeking an exit from the labyrinth of Rockland County's reapportionment dilemma. Kirkpatrick v. Preisler, -U.S.-, 89 S. Ct. 1225, and Wells v. Rockefeller, -U.S.-, 89 S.Ct. 1234, respectively, enjoin legislative bodies to make "good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 (1964)" and that there be "***equal representation for equal numbers of people" as nearly as is practicable.

It is well to note at this juncture that in the period intervening since our last opinion, the Legislature of the State of New York, by Chapter 834 of the Laws of 1969, enacted the so-called "two hats" bill permitting the same person to occupy two elected offices, that of Supervisor and County

Legislator. The said statute also gives legislative sanction for re-apportioning via a multiple-member district plan for electing County Legislators.

Upon the Governor's approving the bill, unfortunately, there was neither message nor memorandum. However, the statute contains a rather complete statement of intent; and upon the Court's initiative, there was made available a "memorandum in support" of the bill prepared by its sponsor, Hon. Edward F. Crawford, Chairman of the Judiciary Committee of the Assembly. In essence, the bill's intent is to give legislative sanction to a variety of re-apportionment plans - some previously held invalid by the courts - and to accord greater flexibility to counties which have to re-apportion. We shall, subsequently, comment further on the statute.

The proponents' plan, we are assured, is the very same plan previously proposed in 1966. Its conceit is to continue and to perpetuate the existing political identities of the five towns which presently constitute the County's body corporate, with each of said towns to elect a varying number of County Legislators

dependent upon their respective populations. The minimum or base population figure for each such representative is derived from the census for the least populous town, to wit, the Town of Stony Point whose population as most recently extrapolated is 11,704. There would thus be allotted one (1)) County Legislator to Stony Point, and the Town of Ramapo - the most populous, with some 73,051 persons - allocated six (6) representatives, resulting in a total of eighteen (18) to be elected.

The proposal continues the office of Town Supervisor, providing for each town to have a Supervisor. The basis for the changes in said latter office derives from the recent statute previously referred to (Chapter 834, L.1969), whereby the same individual may be "elected" to two offices, i.e., County Legislator and Town Supervisor. The County Legislature is to be composed of the Legislators of each Town-District, including the Town Supervisor; but **** one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town" (§5)

Thus, one successful candidate in each of the said five towns who elected Supervisor would automatically be elected a County Legislator. The terms of said offices, however, are not concurrent for the Supervisors would serve for only a two-year term whereas the County Legislators would hold office for four years. Further, a vacancy in the office of a non-Supervisor County Legislator would be "filled by a majority vote of the members of the Town Board of the town contained within the district from which such Legislator was elected." (§6)

Again we note the caveat of the late Mr. Justice Felix Frankfurter that the Supreme Court, in Baker v. Carr, 369 U.S. 186, 268, was creating "a mathematical quagmire" without providing the corollary "legal calculus."

As for the matter at bar, we believe - as shall be more fully

explained hereinafter - that the precise percentage variations in either a multi-member as against a single-member plan are of minimal importance for the initial root problem which has to be resolved is whether there is an insuperable constitutional barrier- temporary or permanent- to the multiple-member district technique of electing local legislators.

Further confronting this court is the rather inexorable political time-table. Assuming, but without so deciding, that there is greater legal merit to the intervenors' proposals for single-member districts, there are the myriad and complex problems involved should the court attempt plastic surgery by severing Rockland County into some eighteen separate, equal and complete districts. Despite the parties and the intervenors having had several years within which to prepare a map keyed to a single-member district plan, none has been presented which

the court could employ, if so minded, to delineate the requisite individual districts if, indeed, the single-member district plan is the only viable constitutional recourse.

Respecting the constitutionality of the "two hats" statute, we find no need to rule thereon since in determining the within section, we can rely on the presumption of constitutionality - however elastic. Its intent and purpose are quite clear - and we are not without judicial conversance in this area since the statute obviously was intended, in part, to overcome our holding in Matter of Brayman v. Stevens, 54 Misc. 2d 974, aff'd 28 A.D. 2d 1095, and by the Court of Appeals in 20 N.Y. 2d 868, which barred a candidate from simultaneously running for both offices of Supervisor and County Representative. It may well be that the legislation validly achieves such purpose of permitting the same person to run for the two offices at the same election; but it neither provides nor sanctions the proposal at bar

whereby a candidate by winning one office is automatically or, at it were, by operation of law, thereby elected to yet another office. The statute, as we construe it, is permissive, i.e., "a plan of apportionment *** may provide *** that supervisors of towns *** shall be eligible to be elected as members of the county legislative body." (§2 (b)) but "election" means garnering the most votes for a particular office. It, therefore, follows that a Town Supervisor may be elected to both said offices at the same election; but he will have to run separately for each office.

It is quite conceivable - and assuredly the electors should be given such electoral option - to reject a candidate as a Supervisor but, nevertheless, to elect him to the office of County Legislator. To do otherwise is to change the statute's sobriquet from the "two hats" bill to "Hobson's Choice", particularly where a district is

entitled to only one County Legislator. The statute's language- "eligible for election"- imports running for each particular office. The fortunate candidate so elected may, indeed, wear two hats, a la Pooh-Bah; but he will have to acquire them by contest, not by grace.

We note that the County places great reliance upon Mr. Justice Dillon's opinion in Town of Greenburgh, et al. v. Board of Supervisors of Westchester County, 298 N.Y.S.2d 615, which was most recently affirmed by the Court of Appeals, -N.Y.2d-, (6/16/69), wherein he selected from three proposals a single-member district plan with modifications he engrafted. The language seized upon by the County respecting the validity of a multiple-member district plan (Greenburgh plan) constitutes dicta since, although observing that it had "good features", it was not approved by that court.

It ineluctably follows from the foregoing that the proposed plan for reapportioning Rockland County cannot be approved in toto; but it is equally inescapable that the reapportionment of Rockland County has been too long delayed. Courts have approved less than ideally acceptable plans, as in Town of Greenburgh, supra, despite reservations or qualms. (See, also, Duquette v. Board of Supervisors of the County of Franklin, 32 A.D.2d 706 (1)).

It is the court's holding that the defendants' proposed plan for reapportionment is approved, but with the following modifications and limitations:

(1) The County Legislature is to be comprised of nineteen (19) County Legislators who shall be elected at the coming general election to be held on the 4th day of November, 1969.

(2) The existing five (5) towns of Rockland County are denominated and declared to be "County Legislative Districts", and each shall elect to the County Legislators, respectively:

District No. 1, Stony Point - one (1) County Legislator

District No. 2, Haverstraw - two (2) County Legislators

District No. 3, Ramapo - seven (7) County Legislators

District No. 4, Clarkstown - five (5) County Legislators

District No. 5, Orangetown - four (4) County Legislators

thereby constituting a total legislative body of nineteen (19) members.

The within modification of adding one additional County

Legislator to the representation from the Town of Ramapo (District No. 3) is prompted by several considerations. A legislative body containing an even number of members which has no provision for a presiding officer casting a vote so as to break a tie vote invites a legislative impasse; that not too improbable eventuality is thereby eliminated.

There is a further and perhaps greater stimulus for so doing. We decline to participate in what may be characterized as a "numbers game", i.e., what are the precise permissible percentile variations in population per Legislator, or what is an acceptable arithmetical differential between the "largest to smallest population per Legislator?" Is it, as contended by the proponents, in the ratio of "1.13 to 1", or rather, twelve (12%) per cent as urged by the objector? (The latter, incidentally, is more nearly correct, for if one district

is "7.1% under represented" and another is "2.5% over represented," this makes for a total differential of 9.6%.)

The solution seems simple; by adding one Legislator to the most grievously under-represented district, we thereby diminish the inequality; and, we also provide the tie-breaking vote. Employing the County's figures of a total County population of 218,804, and dividing by 19, in lieu of the proposed 18, yields, by sheer serendipity, an exact quotient of 11,516 souls per Legislator, per district--and the smallest Town's population, that of Stony Point, is 12, 114. It is true that Ramapo thereby acquires an additional Legislator on a 10,426 per persons basis; but no fairer arithmetical recourse is available unless the number of Legislators is doubled or trebled.

(3) A candidate for both offices of Supervisor and County

Legislator will have to stand separately for election to each said office; and if elected to both, he shall be seated in the County Legislature solely by virtue of his election to that body. The instant conversion of each Supervisor into a County Legislator, but with a different term of office, paraphrasing George Orwell's oft-quoted amphorism, in "Animal Farm", is to declare that "all County Legislators are equal; only some are more equal than others."

(4) Vacancies, if any, in the office of County Legislator, as in Town of Greenburgh, supra, shall be filled by "appointment" by the County Legislature and not by the particular Town Board of the Town which elected the Legislator to be replaced.

We wish to note and to commend the County Attorney and counsel for the League of Women Voters for their excellent comprehensive briefs and oral argument.

The defendants' application is granted to the extent hereinbefore noted. No costs.

Submit judgment on notice.

JOSEPH F. HAWKINS

J.S.C.

Dated: July 21, 1969

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------x

SAMUEL J. ABATE, etc.,

Plaintiff,

-and-

JUNE MOLOF, et al.,

Plaintiffs-Intervenors,

-against-

PAUL F. MUNDT, et al.,

Defendants.

----------x

HAWKINS, J.

Subsequent to the decision herein, dated July 21, 1969, the court's attention has been directed to the effect of adding one additional County Legislator to the representation from the Town of Ramapo. The court has erred in its mathematics and, upon reconsideration, finds this modification creates a thirteen (13%) per cent differential favoring the Town of Orangetown. Comparing the Towns of Ramapo and Orangetown, without giving due consideration to the effects upon the population averages and the resulting variations of percentages in all districts, leads to an undesired result. If it is sought to implement the original intent, a greater number of legislators

would have to be authorized, and this should not be imposed at this time. While the considerations set forth on behalf of the modification remain valid, the untoward mathematical conclusion requires the court to withdraw its statement that "the solution seems simple."

Additionally, it appears that the court was unduly solocitous that a possible legislative stalemate could result from an even numbered total membership in the County Legislature. Thus, there is added cause for keeping the representation for Ramapo to a total of six (6) County Legislators as originally proposed by the County of Rockland.

Accordingly, the court on its own motion, modifies its opinion of July 21, 1969, so that item (1), on pg. 6, shall provide that the County Legislature be comprised of eighteen (18) County Legislators in lieu of "nineteen (19) County Legislators"; and item (2), first paragraph on pg. 7, shall read: "District No. 3, Ramapo" - six (6) County Legislators in lieu of seven (7) County Legislators." Except as hereinabove amended, the opinion of July 21, 1969, stands.

So ordered.

JOSEPH F. HAWKINS
J. S. C.

Dated: July 30, 1969

SUPREME COURT, APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT.

BELDOCK, P.J., BRENNAN, RABIN, MUNDER and KLEINFELD, JJ.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

- and -

JUNE MOLOF, et al.,

Plaintiff-Intervenor-Appellant-Respondents,

- against -

PAUL F. MUNDT, et al.,

Defendants-Respondents-Appellants.

BELDOCK, P.J. (dissenting): On this appeal, we have been called upon to determine the validity of the multi-member district reapportionment plan for the new County Legislature proposed by the Board of Supervisors of the County of Rockland. A subsidiary question is whether an individual elected as a town supervisor may automatically serve as a county legislator without standing separately for election to the legislative post. Special Term and a majority of this Court has approved the reapportionment plan but has held that a candidate for the offices of both supervisor and county legislator must seek election to each post separately. I agree with this determination in part only. In my opinion, the reapportionment plan is unconstitutional.

The proposed reapportionment plan seeks to implement the "one man, one vote" principle by dividing the County into five election districts, the boundaries of which are coterminous with the boundaries of the five towns in Rockland County, and by apportioning

a varying number of elective positions to each district, depending upon its population. The following chart adequately displays the mathematics of the plan:

District	Legislators	Population	Population per Legislator
No.1,Stony Point	1	12,114	12,114
No.2,Haverstraw	2	23,676	11,838
No.3,Ramapo	6	73,051	12,175
No.4,Clarkstown	5	57,883	11,577
No.5,Orangetown	4	52,080	13,020
	18	218,804	

The result of this allotment is that Orangetown is under-represented by 7.1% and that Clarkstown is over-represented by 4.8%.* This yields a maximum variance of 11.9%.

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*The average population per legislator is 12,156. Thus, Stony Point is over represented by 0.3%; Haverstraw is over-represented by 2.5%; and Ramapo is under-represented by 0.2%.

Two recent United States Supreme Court decisions (Kirkpatrick v. Preisler, 394 U.S. 526 and Wells v. Rockefeller, 394 U.S. 542) have cast considerable doubt upon the heretofore-assumed validity of reapportionment plans which managed to achieve de minimis variations but which fell short of exact mathematical equality. In the Kirkpatrick and Wells cases, the court struck down single-member Congressional reapportionment plans with variances of 5.97% and 13.1% respectively. At bar, we are faced with a variance of 11.9% in a multi-member scheme involving a county legislature. In Town of Greenburgh v. Board of Supervisors, 32 A.D. 2d 892, affd 25 NY 2d _____ (decided June 16, 1969), the Court of Appeals concurred in our approval of Westchester's single-member district plan with a maximum variance of 12.8%. I reject, however, the suggestion that, because the variance is 11.9%, the approval of Westchester's reapportionment plan in the Town of Greenburgh case automatically brings the plan at bar within the

ambit of constitutional standards. In my opinion, the reasoning of the Kirkpatrick and Wells cases is decisive of this appeal and we cannot justify an affirmance here solely upon the mathematics of Town of Greenburgh. In Kirkpatrick, supra, the court stated:

"We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives,' Wesberry v. Sanders, supra, at 18, the 'as nearly as practicable'

standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533,577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."
(Kirkpatrick v. Preisler, supra, at 530-531) (emphasis supplied)

The force of this statement is not diminished because of the circumstances that the court in Kirkpatrick was dealing with Congressional as opposed to inter-state reapportionment (See Reynolds v. Sims, 377 U.S. 533; Wells v. Rockefeller, supra, at 554 (White, J. dissenting)), nor that it was concerned with a single member as opposed to a multi-member district plan (See Burns v. Richardson, 384 U.S. 73; Swann v. Adams, 385 U.S. 440; Kilgarlin v. Hill, 386 U.S. 120). In the light of the Kirkpatrick and Wells cases, these distinctions are essentially

meaningless in the context of the one man, one vote principle; particularly so where, as here, we are dealing with a unicameral legislature.

This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that the county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing the abstract acceptability of a multi-member districting plan) is that the variance is de minimis. This argument is predicated on language in the Reynolds and Swann cases to the effect that de minimis variances will be accepted provided that a rational state policy underlies the

basis for the variances. It seems to me, though, that the Wells and Kirkpatrick cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the court in Wells v. Rockefeller, supra, where New York sought to justify variances by pointing to the maintenance of county lines. The court stated:

> "*** New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in Kirkpatrick that 'to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal

representation for equal numbers of people.'" (Wells v. Rockefeller, supra, at 546)

Defendants' counter-argument that the use of town lines is an obstacle to gerrymandering was met by the court in Kirkpatrick:

"The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." (Kirkpatrick v. Preisler, supra, at 534) (footnote omitted)

In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that

the towns must stay intact - a notion which has been rejected by the Supreme Court in its latest pronouncements.

Though I believe that the within plan is unconstitutional, I would not recommend that it be disapproved. Because the last day for filing nominating certifications is imminent (September 5th), I feel that our unreserved disapproval, for obvious reasons, would be ill-advised (See Kilgarlin v. Hill, 386 U.S. 120,121; Martin v. Bush, 376 U.S. 222,223). Accordingly, I would modify the judgment only to the extent of directing that a new reapportionment plan be submitted after the election of November 4th.

August 26, 1969

Judgment of the Supreme Court, Rockland County, entered July 31, 1969, affirmed, without costs, insofar as appealed from.

BRENNAN, RABIN, MUNDER and KLEINFELD, JJ., concur.

BELDOCK, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

STATE OF NEW YORK
COURT OF APPEALS

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2. No. 428 69

Samuel J. Abate,
Plaintiff-Appellant-Respondent,

-and-

June Molof & ors., & c.,
Plaintiffs-Intervenors-Appellants-
Respondents,

-and-

Cornelius T. O'Sullivan, & ors.,
Plaintiffs-Intervenors-Appellants-
Respondents,

-vs.-

Paul F. Mundt, & ors., & c.,
Defendants-Respondents-Appellants.

OPINION

Unrevised and
Uncorrected.
Not for
Publication.

BURKE, J.:

Rockland County is presently governed by a Board of Supervisors, consisting of the Supervisors of each of the County's five constituent towns. In early 1966, a federal district court, upon its finding that the Board was malapportioned, ordered that a plan be devised which would satisfy the requirements of the Equal Protection Clause and that such plan be submitted to the voters of the County for their approval. (Lodico v. Board of Supervisors, 256 F. Supp. 442) Pursuant to that order, three plans were devised and submitted to the voters but were rejected at the polls.

In September, 1968, the present action was brought to compel the Board to reapportion in accordance with constitutional requirements. In response, the Board submitted a weighted voting scheme as an interim measure but, upon the plaintiffs' motion, that plan was rejected at

Special Term. The Board then devised and submitted the plan approved in the courts below, which is the subject of the present appeal.

The plan as adopted provides for a County legislature composed, on the basis of the population of the County as of 1969, of eighteen members chosen from five districts which correspond to the County's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest district. The smallest district, Stony Point, has a population of 12,114 and is assigned one representative in the County legislature. The number of representatives to be assigned to each of the other districts is determined by dividing the population of each by the population of the base district, Stony Point, the number of representatives being the whole number resulting from that computation, plus any major fraction. The result in tabular form is as follows:

District	Population	No. of Representatives
Stony Point	12,114	1
Haverstraw	23,676	2
Orangetown	52,080	4
Clarkstown	57,883	5
Ramapo	73,051	6

Each representative is to be elected at large within the district so that each district other than Stony Point will be a multi-member district. Since the population of none of the other districts is an exact multiple of the population of Stony Point, there is some variation among districts in terms of the population per legislator, with the result that Stony Point is 0.3% "over-represented," Haverstraw is 2.5% "over-represented", Orangetown is 7.1% "under-represented," Clarkstown is 4.8% "over-represented," and Ramapo is 0.2% "under-represented." The plaintiffs attack the plan both on the ground that the Board has made

no attempt at achieving equality of representation in terms of population and on the ground that the utilization of multi-member districts is inherently defective. In addition, the plaintiffs attacked the so-called "two hats" provision of the plan under which each Town Supervisor, by virtue of his election to that office, would also automatically become a member of the County legislature.

Special Term approved the apportionment plan but modified the "two hats" provision so as to require that Town Supervisors, if they wish to hold seats in the County legislature, must stand separately for election to that office. The Appellate Division, Second Department affirmed that determination without opinion, with one justice dissenting on the ground that the plan merely sought to achieve the best apportionment possible in terms of the maintenance of existing town lines. We, in turn, affirm the order of the Appellate Division.

I

It is, of course, true that the "one man - one vote" principle enunciated in Reynolds v. Sims (377 U.S. 533) is applicable to local legislative bodies as well as to state legislatures (Avery v. Midland County, 390 U.S. 474,481). Under the principles set forth for the purpose of determining whether a particular plan of apportionment meets the requirements of the Equal Protection Clause, the question is whether the plan before us adequately apportions representatives on a population basis. However, the issue is not to be resolved merely in terms of a sterile mathematical exercise:

> "(T)he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts*** as nearly of equal population as is practicable. We realize that it is a practical

impossibility to arrange legislative districts so that each has an identical number of residents, or citizens or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." (Reynolds v. Sims, supra at 577 (emphasis added)

Thus, the mere fact that there is a variation of 13% in the number of people per legislator under the present plan is not of itself sufficient to render the plan constitutionally defective (Roman v. Sincock, 377 U.S. 695, 711; Kirkpatrick v. Preisler, 394 U.S. 526, 530; Town of Greenburgh v. Board of Supervisors, 25 NY 2d 818). We must, therefore, in light of the particular circumstances of this case, determine whether the County has made a good faith effort to achieve equality of representation and whether there is sufficient justification for any variance from absolute equality. On this point,

it should be recognized that the "one-man, one-vote" cases have involved at least three levels, there are quite properly taken into account and weighed in the balance difference considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent (See Wesberry v. Sanders, 376 U.S. 1; Kirkpatrick v. Preisler, 394 U.S. 526; Wells v. Rockefeller, 394 U.S. 542). Decisions dealing with apportionment of state legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations (See Fortson v. Dorsey, 379 U.S. 433,437; Burns v. Richardson, 384 U.S. 73;

Swann v. Adams, 385 U.S. 440). Similarly, and of particular relevance on this appeal, the Court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intra-state legislative bodies (See Sailors v. Board of Educ., 387 U.S. 105; Dusch v. Davis, 387 U.S. 112; Blaikie v. Wagner, 285 F. Supp. 364).

In light of this apparent difference in treatment, it seems clear that we may find the population variance here to be within permissible limits (See Town of Greenburgh v. Board of Supervisors, 25 NY 2d 817) and the practical and historical justification for the variance to be sufficient. What the plan does is not to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government

framework, thus accommodating both constitutional and practical considerations (See Jackman v. Bodine, 53 N.J. 585, 252 A. 2d 209, cert. den. 38 U.S. L.W. 3120 (10/14/69)) It represents a balanced, bona fide application of the "one-man, one vote" principle to the needs and circumstances of local government. As such, it comes within the ambit of the Supreme Court's declaration "that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines" (Swann v. Adams, 385 U.S. 440, 444 (emphasis added)) and the declaration that the recognition of such factors in devising an apportionment scheme is permissible so long as they "are free of any taint of arbitrariness or discrimination." (Roman v. Sincock, 377 U.S. 695, 710) We therefore reject the

contention that the plan before us is constitutionally defective because of the minor population variance involved.

It is also contended that the plan's incorporation of multi-member districts necessarily indicates a constitutional defect. However, the contention flies in the face of the decision in Fortson v. Dorsey (379 U.S. 433) in which the Court held that multi-member districts, drawn substantially along existing county lines, are constitutionally permissible so long as the vote of each voter is "approximately equal in weight to the vote of any other citizen in the State." (379 U.S. at 438) As with Fulton County, Georgia, in Fortson, the population of the Ramapo district in this case is approximately six times larger than that of Stony Point, a single-member constituency, and for that reason Ramapo elects six representatives. According to the reasoning of that opinion, such a multi-member district device is permissible since each voter in Ramapo votes for six

representatives to represent his interests in the County legislature and, if the weight of the vote of any voter in Ramapo, when he votes for six representatives, is not the exact equivalent of that of a resident of a single-member district, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the County (379 U.S. at 437-438). That conclusion also adequately disposes of any claimed deficiency in such a plan based upon speculative mathematical analysis of such things as the "effectiveness" of actual representation. Indeed, as long as the basic population requirements of Reynolds v. Sims are met, and we hold that the Rockland County plan does meet those fundamental requirements, the use of multi-member districts "will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the

voting strength of a racial or political element of the voting population.'" (Burns v. Richardson, 384 U.S. 73, 88). No such showing has been made as to the plan under attack in this case. We therefore hold that the Rockland County Apportionment plan is constitutional.

II

The plan as adopted also contained a so-called "two hats" provision by which the person elected to the office of Town Supervisor of each of the five towns would automatically be entitled to a seat in the county legislature. Special Term modified this provision of the plan so as to require that, if a Town Supervisor also wished to hold a seat as a County legislator, he must be elected separately to the latter position. We affirm that determination. Town Supervisors are eligible to sit as members of County legislatures by virtue of the recently amended Section 10 of the Municipal Home Rule Law (L. 1969, ch. 834) which provides, in pertinent part, that "a plan of apportionment adopted by a county *** may provide *** supervisors of towns *** shall

be eligible to be elected as members of the county legislative body." (Emphasis added) The use of the term "elected" must be taken as indicating an intention on the part of the legislature that a town supervisor could serve as a county legislator only if he prevailed in an election for the office of county legislator. Although it is true that we held in Matter of Brayman v. Stevens (20 NY 2d 969) that Section 411 of the County Law prohibited a county officer from serving as a town supervisor, that decision antedated the enactment of Section 10(13) (b) of the Municipal Home Rule Law with which it is obviously inconsistent. Under familiar principles of statutory construction, the conflict between these provisions must be resolved by holding that the latter section impliedly repealed the former insofar as they are inconsistent, with the result that the latter is controlling. Special Term therefore properly determined that the plan should be modified to the extent indicated above.

Accordingly, the order of the Appellate Division, Second Department should be affirmed.

COURT OF APPEALS

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SAMUEL J. ABATE, as a Taxpayer, etc.,
Plaintiff-Appellant,

-and-

JUNE MOLOF, et al.,
Plaintiffs-Intervenors-Appellants,

-against-

PAUL F. MUNDT, et al., constituting
the Board of Supervisors,
Defendants-Respondents-Appellants.

- -x

FULD, CH. J. (dissenting in part):

I agree that the Municipal Home Rule Law (§10 (13) (b)) permits a town supervisor to serve on the county legislature and requires that he stand

separately for election to that body. I cannot, however, subscribe to the court's decision that the reapportionment plan adopted by the board in this case satisfies the demands of the Equal Protection Clause. In my view, the apportionment standards which apply to the states also apply to municipalities - e.g., counties, cities and towns - which exercise general governmental functions.

As the court's opinion indicates, Rockland County's proposal provides that each of its five towns shall constitute a legislative district. Using the smallest town, Stony Point, as a base, it accords each of the other four towns additional seats in the county legislature in an amount determined by dividing their populations by that of Stony Point and rounding off the result to the nearest whole number. Following this year's election under the plan, Orangetown's legislators will represent 13% more people than those from Clarkstown, even though each would be accorded the same vote in the county legislature.

There is no doubt that, in passing on a plan of apportionment, we are governed by the "one man, one vote" principle laid down in Reynolds v. Sims (377 U.S. 533) and in the cases which followed it. The majority asserts, however, that the structures of that principle vary and are to be applied differently depending on the "level of legislative apportionment" involved (Opinion, p.3). More specifically, it is stated that, although the permissible variation in population between congressional districts is "almost micrometric," there is a somewhat "broader scope for permissible deviations" in the apportionment of state legislatures and a "still broader scope" where the plan involves "local, intra-state legislative bodies" (Opinion, p.4).

Significantly, though, the opinion furnishes not a single reason which would justify such a differentiation, and I suggest that there is no basis either in logic or precedent for the distinction

sought to be drawn. On the contrary, the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legislature. There is no reason in either case why a citizen's voting power - his ability to influence the outcome of the election - should depend upon the district in which he happens to live. There is, as the Supreme Court observed in Avery v. Midland County (390 U.S. 474, 481), "little difference, in terms of the application of the Equal Protection Clause and the principles of Reynolds v. Sims, between the exercise of state power through (state) legislatures and its exercise by elected officials in the cities, towns, and counties." Indeed, in Seaman v. Fedourich (16 N Y 2d 94) and in Iannucci v.

Board of Supervisors (20 NY 2d 244) - both of which antedated the Supreme Court's decision in the Avery case - our court expressly held that the Reynolds principle applies to "elective legislative bodies exercising general governmental powers at the municipal level" (16 N Y 2d, at p.101; 20 N Y 2d, at p.249) and rejected proposals for legislative apportionment on the county and municipal levels which failed to accord equality of representation. (See, also, Honig v. Board of Supervisors, 24 N Y 2d 861).

In support of its conclusion that a lower standard of equality applied to elections of representatives to local legislative bodies, the court relies on two Supreme Court decisions - Sailors v. Board of Education (387 U.S. 105) and Dusch v. Davis (387 U.S. 112) - in which plans for the structuring of local governments were upheld. These cases are, however, totally inapposite. Sailors v. Board of Education, for instance, involved a scheme for the

appointment of nonlegislative officials and was not at all concerned with legislative apportionment; and, in the Dusch case, all of the legislators were to be elected at large and districts (or, more precisely, boroughs) were to be used "'merely as a basis of residence for candidates, not for voting or representation'" (387 U.S., at p. 116).[1]

These cases do, it is true, recognize the need for innovation and flexibility in the organization of local governments but there is nothing in the decisions which implies that, in drawing electoral districts for

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1. Indeed, the court pointed out that, "If a borough's resident on the counsel represented in fact only the borough, residence being only a front, different conclusions might follow" (387 U.S., at p. 116).

legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area. "Diluting the weight of votes because of place of residence," the Supreme Court noted in Reynolds (377 U.S. 533, 566, supra), impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race (case cited) or economic status (case cited)."

In considering the plan before us, I find it difficult, if not impossible, to accept the majority's characterization of the 13% deviation infecting the proposed plan as a "minor population variance" (Opinion, p.5). I recognize, of course, that mathematical exactness or precision is not always possible and that the test to be applied in determining the validity of a plan is not solely the size of the percentage deviation. Nevertheless, an attempt must be made to keep that deviation to a minimum. As I read the relevant

cases, the significant and operative consideration is whether the plan under review reflects such an effort to achieve, "as nearly *** as is practicable," equality of representation. (Reynolds v. Sims, 377 U.S. 533, 577, supra; see Kirkpatrick v. Preisler, 394 U.S. 526, 531.) As the court declared in the Kirkpatrick case, legislative districts must be drawn to allow "only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which a justification is shown."

It is the court's position that, despite the deviation population which the plan creates, factors other than population are equally significant and that the proposal represents a "bona fide application of the 'one man, one vote' principle to the needs and circumstances of local governments" which satisfies constitutional requirements (Opinion, p.4). This, it seems to me, misconceives the meaning of the phrase, "good-faith effort," found

in the cases. Even if one were to accept the majority's premise that the demands of the Equal Protection Clause may be relaxed in dealing with a county apportionment plan, nevertheless, the simple fact remains that "(p)opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." (Reynolds v. Sims, 377 U.S. 533, 567, supra.)

In the present case, population was neither "the starting point" nor " the controlling criterion." It is undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only after the districts had been created and its lines fixed that any attempt was made to equalize the voting representation - an attempt which could not possibly succeed because of the nature of the plan.

Actually, the 13% deviation - described by the court as "minor" (Opinion, p.5) - neither indicates

nor reflects the potential for gross inequality of representation inherent in the scheme. Since the number of legislators from any town is determined by dividing its population by that of the smallest town and rounding off the result to the nearest whole number, the size of the deviation will vary arbitrarily from year to year, according to the size of the fraction to be rounded.[2] For example, had the plan been in effect in 1950, the deviation would have been 26%; in 1957, 22%; in 1963, 27% and in 1966, 26%. The potential for inequality

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2. In other words, if the population of each of the towns happen to approximate an integral multiple of that of Stony Point - as it does under the 1969 census - then, the deviation will be relatively small - for example, as in this case, 13%. More typically, however, the formula will require a rounding off of large fractions and will result, accordingly, in very much greater deviations.

inherent in the plan becomes even more apparent when one considers that an increase of only 3,000 in the population of Stony Point, assuming that the populations of the other towns remain constant, would change the deviation from the present 13% to more than 47%. In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%.[3] And, since the plan rigidly fixes district lines - providing for no variation - there is no way to compensate for or minimize such extreme deviations.

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3. This may be seen from the following example: if the smallest town, town A, had a population of 10,000, town B had 14, 999 and town C had 15, 001, then, under the plan, town C would have two representatives and town B would only have one, even though their populations were almost identical. The deviation in such a case would be 99.96%.

This, though does not mean that political subdivisions may not be taken into account when drawing legislative districts. I recognize, of course, that there may be historical and, perhaps, functional reasons for preserving the identity of the towns in a county legislative body - even though no such reasons have been shown in this case and even though the towns would remain independent, coordinate governments under any scheme. All that is required is that a plan be sufficiently flexible to give all the voters of the County an equal voice in its government. Population, as the Reynolds case indicates, need not be the only factor to be considered but it must be the controlling factor (377 U.S., at pp.579-580):

> "(N)either history along, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for

deviations from the equal-population principle."

And, underscoring the same thought, the court went on to say (p.581):

> "(I)f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

Here, quite obviously, population was "submerged as the controlling consideration" in fixing the boundaries of the legislative districts and, consequently, the right of the county's citizens "to cast an effective and adequately

weighted vote (has been) unconstitutionally impaired."

That it is possible to reconcile the one man, one vote principle with the desire to preserve town identity in the county legislature is demonstrated by a proposal prepared by the League of Women Voters and put forward by several of the plaintiffs. Under this plan, all but three of the 18 members of the legislature would still represent districts located wholly within town lines and, as so apportioned, the maximum population deviation would amount to only 4%. Indeed, the plan approved in Town of Greenburgh v. Board of Supervisors (59 Misc 2d 152, affd. 25 N Y 2d 817) - upon which the court relies - illustrates an approach which could have been, but was not, followed here. Although it resulted in a deviation of 14%, slightly more than will result this year from the plan before us, the proposal in Greenburgh was held acceptable because town lines, while accorded weight, were not treated as

inviolate. In sharp contrast to the present case, the traditional town boundaries were disregarded where necessary in order to accommodate the essential interest of equal representation.

In sum, then, in view of the fact that the legislative districts were drawn strictly in accordance with town lines and without regard to population, it is evident that there was no effort, good faith or otherwise, to achieve "as nearly as practicable" equality of voting power. Since under the plan the weight of a citizen's vote varies depending on the town in which he lives and this variance is likely to increase in future years, the plan deprives the voters of equal protection of the laws and may not be constitutionally sustained.[4]

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4. Having reached this conclusion, I find it unnecessary to treat the plaintiffs' further point that a multi-member districting scheme is unconstitutional on the ground that

However, in view of the imminence of the 1969 election and the fact that the plan achieves far greater equality than the existing board of supervisors form of county government, I would approve the plan as an interim measure and require the county legislature, to be elected next month, to formulate a further plan of apportionment consistent with constitutional standards. (See Honig v. Board of Supervisors, 24 N Y 2d 861, supra.)

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4. (cont'd.) it "allocates greater voting power to voters in the most populous districts." (Banzhaf, Multi-Member Electoral Districts - Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309, 1337; see Chavis v. Whitcomb, ___F. Supp. ___, ___, 38 USLW 2104 (decided by U.S. Dist. Ct. So. Dist. Ind., July 28, 1969); cf. Iannucci v. Board of Supervisors, 20 N Y 2d 244, 252, supra.) I merely note that, although the Supreme Court has, on several occasions, upheld the constitutionality of multi-member district plans, it has yet to pass upon the arguments

The order appealed from should be modified to the extent of directing that a new apportionment plan be adopted by the county legislature chosen in the 1969 election and, as so modified, affirmed.

* * * * * * *

Order affirmed, without costs. Opinion by Burke, J. All concur except Fuld, Ch. J., who dissents in part and votes to modify in an opinion in which Jasen, J., concurs.

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4. (cont'd.) raised in the present case. (See, e.g., Burns v. Richardson, 384 U.S. 73; Fortson v. Dorsey, 379 U.S. 473.)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR October 8, 1969

2. No. 428 69

Samuel J. Abate,
Plaintiff-Appellant-Respondent,

-and-

June Molof & ors., & c.,
Plaintiffs-Intervenors-Appellants-Respondents,

-and-

Cornelius T. O'Sullivan, & ors.,
Plaintiffs-Intervenors-Appellants-Respondents,

-vs.-

Paul F. Mundt, & ors., & c.,
Defendants-Respondents-Appellants.

BE IT REMEMBERED, That on the 17th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Samuel J. Abate, the plaintiff-appellant-respondent, and June Molof, & ors., & c., and Cornelius T. O'Sullivan, & ors., the plaintiffs-intervenors-appellants-respondents, in this cause, came here unto the Court of Appeals, by Barr & Barone, Doris Friedman Ulman, and Paul H. Rivet, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Paul F. Mundt, & ors., & c., the defendants-respondents-appellants in said cause, afterwards appeared in said Court of Appeals by J. Martin Cornell, their attorney, and also filed a Notice of Appeal

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank P. Barone, of counsel for the appellant-respondent, and by Mrs. Doris Friedman Ulman and Mr. John F. Banzhaf, III, of counsel for the intervenors Molof, & ors., and by Mr. Paul H. Rivet, of counsel for the intervenors O'Sullivan, & ors.,

and by Mr. J. Martin Cornell, of counsel for the respondents-appellants, and by Mr. Robert Imrie, of counsel for the Attorney General of the State of New York, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the same Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON
Clerk of the Court of
Appeals of the State of
New York

COURT OF APPEALS, CLERK'S OFFICE)
)
Albany, October 8, 1969.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON
Clerk.

District	Population	Population per Legislator	
Stony Point	12,114	12,114	0.3% over-represente
Haverstraw	23,676	11,838	2.5% over-represente
Ramapo	73,051	12,175	0.2% under-represente
Clarkstown	57,883	11,577	4.8% over-represente
Orangetown	52,080	13,020	7.1% under-represente